Supreme Court, U. S.
FILED
NOV 30 1979
JR., CLERK

In the Supreme Court of the United States

No. 79-142

SUSAN GARFINKLE, et vir.,

Respondents,

vs.

SUPERIOR COURT OF CONTRA COSTA COUNTY
(WELLS FARGO BANK, ET AL.,
Real Parties in Interest),

Petitioners.

Petitioners' Reply to Respondents' Brief in Opposition

On Petition for Writ of Certiorari to the Supreme Court of the State of California

DAVID W. LENNIHAN
Spear Street Tower
One Market Plaza
San Francisco, CA 94105
(415) 442-0900
Attorney for Petitioners

Of Counsel:

BROBECK, PHLEGER & HARRISON
DAVID J. BROWN
Spear Street Tower
One Market Plaza
San Francisco, CA 94105
(415) 442-0900

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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SUPERIOR COURT OF CONTRA COSTA COUNTY
(WELLS FARGO BANK, ET AL.,
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Petitioners' Reply to Respondents' Brief in Opposition

On Petition for Writ of Certiorari to the Supreme Court of the State of California

Petitioner, Wells Fargo Bank, National Association, raised at all court levels the constitutional question it now brings before this Court.

Specifically, it was presented:

1. To the Trial Court by its Memorandum Regarding Proposed Class and Class Notice, filed February 27, 1978, by its Supplemental Points and Authorities in Support of Motion for Summary Judgment, filed September 12, 1978, by its Reply to Plaintiffs' Opposition to Motion for Summary Judgment, filed September 13, 1978;

2. To the Intermediate Appellate Court by its Response to Petition for Extraordinary Relief, filed January 5, 1979;

3. To the California Supreme Court by its Petition for Hearing, filed April 16, 1979.

Excerpts from these papers are set forth in Appendix A. Respondents' representations to the contrary are false.

DATED: November 29, 1979

Respectfully submitted,

DAVID W. LENNIHAN

BROBECK, PHLEGER & HARRISON
DAVID J. BROWN
of Counsel.

(Appendix follows)

Appendix A

FILED
Feb 27 1978
J. R. OLSSON, County Clerk
Contra Costa County
By J. PUGH, Deputy

Superior Court of the State of California
County of Contra Costa

No. 143399

SUSAN GARFINKLE, et ux.,
Plaintiffs,

vs.

WELLS FARGO BANK, et al.,
Defendants.

Memorandum Regarding Proposed
Class and Class Notice

. . . A. *Decisions changing formerly well-settled contract law are not given retroactive application to impair rights under contracts entered into when the formerly well-settled rule was applicable.*

Plaintiffs' assumption underlying this purported class action is that a result in *Wellenkamp v. Bank of America,* No. L.A. 30776, Supreme Court of the State of California favorable to the plaintiffs there, will inure to the benefit of plaintiffs here and the class described in their proposed order. That is to say, that such a result may be given retroactive application to purchasers from a grantor who was a trustor of a Wells Fargo Bank deed of trust containing a due-on-sale clause, which trust deed was executed in 1967.

This assumption is erroneous.

It ignores the rule, having constitutional origins, that the overruling of an established judicial precedent will not be given retroactive effect to impair contracts which were valid under the formerly accepted rule.

> " '[T]o permit a subsequent judicial decision in any one case on a point of law to open and annul everything that has been done before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of mankind, no such pernicious precedent is to be found.' " *Bank of America v. Department of Mental Hygiene,* 246 Cal. App.2d 578, 586 (1966).

* * *

The principle of which we speak was applied in 1853 by the United States Supreme Court which, in *Ohio Life Insurance and Trust Co. v. Debolt,* 57 U.S. (16 How.) 415 said:

> "Indeed, the duty imposed upon this court to enforce contracts, honestly and legally made, would be vain and nugatory, if we were bound to follow *those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce.* * * * And the sound and true rule is, that if the contract when made was valid by the law of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law."

* * *

Since neither plaintiffs nor the purported class would benefit from any change in the law, the class should not be certified, and the Court's earlier notice of decision should be vacated. . . .

FILED
Sep 12, 1978
J. R. OLSSON, County Clerk
Contra Costa County
By J. BARLETTANI, Deputy

Superior Court of the State of California
County of Contra Costa

No. 143399

SUSAN GARFINKLE, et ux.,
Plaintiffs,

v.

WELLS FARGO BANK, et al.,
Defendants.

Supplemental Points and Authorities in Support of Motion for Summary Judgment

The Supreme Court's ruling in *Wellenkamp v. Bank of America* (a copy of which is attached as Exhibit A to the initial memorandum of points and authorities) overruling the validity of due-on-sale clauses for absolute sales in certain instances cannot constitutionally be given retroactive application to notes and deed of trust contracts which were legal and binding prior to the Court's decision to change the law.

To do otherwise ignores the rule, having constitutional origins which precludes the giving of retroactive effect to a decision overruling established judicial precedent so as to impair contracts which were valid under the formerly accepted rule:

> " '[T]o permit a subsequent judicial decision in any one case on a point of law to open and annul everything that has been done before, under a different understanding of the law,

would lead to the most mischievous consequences. Fortunately for the peace and happiness of mankind, no such pernicious precedent is to be found.' " *Bank of America v. Department of Mental Hygiene,* 246 Cal. App.2d 578, 586 (1966).

The full principle is announced in *Mitchell v. National Auto. & Casualty Ins. Co.,* 38 Cal.App.3d 599, 604 (1974):

"Although it is the general rule that a decision by a court of supreme jurisdiction overruling a prior decision is retrospective [sic] in operation, there is a well-recognized exception to this rule: Where a statute has received a given construction by the court and contracts have been made or property rights acquired in accordance with the court's decision such contracts will not be invalidated nor will vested rights acquired under the decision be impaired by a change in construction adopted in a subsequent decision. In such a situation, the later decision will be given prospective and not retrospective [sic] effect."

The principle of which we speak was applied in 1853 by the United States Supreme Court which, in *Ohio Life Insurance and Trust Co. v. Debolt,* 57 U.S. (16 How.) 415 said:

"Indeed, the duty imposed upon this court to enforce contracts, honestly and legally made, would be vain and nugatory, if we were bound to follow *those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce.* * * * And the sound and true rule is, that if the contract when made was valid by the law of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law."

Bank of America v. Burg Bros., 31 Cal.App.2d 352 (1939); *Bennett v. Superior Court,* 5 Cal.App.2d 13 (1935); *Brown v. Ferdon,* 5 Cal.2d 226 (1936); *Craemer v. Norton Realty,* 33 Cal. App.2d 340 (1939); *Drapeau v. Smith,* 34 Cal.App.2d 84 (1939); *Hales v. Snowden,* 19 Cal.App.2d 366 (1937); *Kirkpatrick v. Stelling,* 36 Cal.App.2d 658 (1940); *Shelly v. Kraemer,* 334 U.S. 1 (1947).

See also Westbrook v. Mihaly, 2 Cal.3d 765, 800 (1970) and *Forster Shipbuilding Co. v. County of Los Angeles,* 54 Cal.2d 450 (1960).

Accordingly, it is appropriate that the Order for Certification of the Class be vacated and that this action be dismissed.

Dated: September 12, 1978

Respectfully submitted,

DAVID W. LENNIHAN
GEORGE A. CUMMING, JR.
DAVID J. BROWN
BROBECK, PHLEGER & HARRISON

By DAVID W. LENNIHAN
David W. Lennihan

FILED
SEP 13 1978
J. R. OLSSON, County Clerk
CONTRA COSTA COUNTY
By Carmen, Deputy

Superior Court of the State of California
County of Contra Costa

No. 143399

SUSAN GARFINKLE, et ux.,
Plaintiffs,

v.

WELLS FARGO BANK, et al.,
Defendants.

Reply to Plaintiffs' Opposition to Motion
for Summary Judgment

. . . This Court should not deprive the defendants of rights which exist now and will lapse on September 24, 1978, according to the decision in *Wellenkamp,* which we assert is itself an unconstitutional impairment of obligations under contracts valid when made, as we more fully show in our Supplemental Memorandum in Support of Motion for Summary Judgment currently being filed.

. . .

Plaintiffs' opposition to Defendants' Motion is without merit.

DATED: September 12, 1978.

Respectfully

BROBECK, PHLEGER & HARRISON

By DAVID W. LENNIHAN
David W. Lennihan
Attorneys for Wells Fargo Bank

FILED
JAN-5 1979
Court of Appeals App. Div.
CLIFFORD C. PORTER, Clerk
By ..... Deputy

In the Court of Appeal of the State of California
First Appellate District

Division Three

Civil No. 45643

SUSAN GARFINKLE and GARY GARFINKLE,
Petitioners,

v.

SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF CONTRA COSTA,
Respondent,

WELLS FARGO BANK AND AMERICAN
SECURITIES COMPANY,
Real Parties in Interest.

RESPONSE TO PETITION
FOR EXTRAORDINARY RELIEF

* * *

C. WELLENKAMP CANNOT BE APPLIED TO OLD TRUST DEEDS WITHOUT DEPRIVING THEIR BENEFICIARIES OF DUE PROCESS AS REQUIRED BY THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION

At the time the Deed of Trust which is the subject matter of this action was made and for a considerable time thereafter due-on-sale clauses were lawfully exercisable when the trustor sold his

property to a third person. In fact, until *Wellenkamp* the validity of due-on-sale clauses, at the outright sale of property, had been sustained by the courts over a period of many years in California. *Coast Bank v. Minderhaut,* 61 Cal.2d 311 (1964); *Cherry v. Home Savings & Loan Assn.,* 276 C.A.2d 574, 580 (1969), hearing denied. *La Sala v. American Sav. & Loan Assn.,* 5 Cal.3d 864 (1971); *Tucker v. Lassen Sav. & Loan Assn.,* 12 Cal.3d 629 (1974).[2] And elsewhere. *Stith v. Hudson City Savings Institution,* 313 N.Y.S.2d 804 (N.Y. 1970); *Malouf v. Midland Federal,* 509 P.2d 1240 (Col. 1973); *Gunther v. White,* 489 S.W.2d 529 (Tenn. 1973); *Baker v. Loves Park Sav. & Loan Assn.,* 333 N.E.2d 1 (Ill. 1975); *Mutual Fed. Sav. & Loan Assn. v. Wisconsin Wire Works,* 239 N.W.2d 20 (Wis. 1976); *First Commercial Title Inc. v. Holmes,* 550 P.2d 1271 (Nev. 1976); *Century Fed. Sav. & Loan Assn. v. Van Glahn,* 364 A.2d 558 (N.J. 1976); *Miller v. Pacific First Fed. Sav. & Loan Assn.,* 545 P.2d 546 (Wash. 1976); *Crockett v. First Fed. Sav. & Loan Assn.,* 224 S.E. 2d 580 (N.C. 1976).

The result of these decisions was an expectation in parties to trust deeds that due-on-sale clauses were validly enforceable. The right of the lender to accelerate on sale of the property was and is a property right subject to the protections of the due process clause of the Fourteenth Amendment of the United States Constitution:

---

2. This precedent as to outright sales by a trustor was not disturbed by the Supreme Court in *Tucker v. Lassen Sav. & Loan Assn.*, 12 Cal.2d 629 (1974), and *La Sala v. American Sav. & Loan,* 5 Cal.3d 864 (1971). In *La Sala* the Court held:

> "[W]e have concluded that the lender may insist upon the automatic performance of the due-on-sale clause because such a provision is necessary to the lender's security." [*La Sala* at 883.]

In *Tucker,* the Court noted that its upholding of *Coast Bank* in *La Sala* had been criticized, but the Court chose not to deal with *Coast Bank* in *Tucker.* (*Tucker* at 634-635.)

> "Contract rights are a form of property and as such may be taken for a public purpose *provided that just compensation is paid. Contributors to Pennsylvania Hospital v. Philadelphia,* 245 U.S. 20 (1917); see *El Paso v. Simmons,* 379 U.S. 497, 533-534 (1965) (Black, J., dissenting)." *United States Trust Company v. New Jersey,* 431 U.S. 1, 19 (1976). (Emphasis supplied).

Wellenkamp expressly changes the prior law and takes away the due-on-sale contract right that previously existed. This taking was without compensation and thus violates due process.

* * *

Supreme Court
FILED
APR 16 1979
G. E. BISHEL, Clerk

In the
Supreme Court of the State of California

Civil No. 45643

SUSAN GARFINKLE and GARY GARFINKLE,
Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA,
Respondent,

WELLS FARGO BANK and AMERICAN SECURITIES COMPANY,
Real Parties in Interest.

PETITION FOR HEARING

* * *

II. *The Constitutional Question.*

As of 1970, due-on-sale clauses had been upheld by California courts as not constituting unreasonable restraints in 1964, *Coast*

Bank v. Minderhout, 61 Cal.2d 311, 1967, *Jones v. Sacramento Sav. & Loan Assn.,* 248 Cal.App.2d 522, and 1969, *Cherry v. Home Sav. & Loan Assn.,* 276 Cal.App.2d 574, *Hellbaum v. Lytton Sav. & Loan Assn.,* 274 Cal.App.2d 456, after more than a decade of wide-spread commercial custom and practice, McDearmon Affidavit, attached as an Exhibit to Exhibit A to Response to Petition for Rehearing (Modification Only) in the Court of Appeal.

This action was not filed in the State Court *until April of 1974.*[7]

It was in 1974, after the decision in *La Sala v. American Savings and Loan Association,* 5 C.3d 864 (1971) and while *Tucker v. Lassen Savings and Loan Association,* 72 Cal.3d 629 (1974) was pending in this Court, and with specific reference to *La Sala* and *Tucker,* that the Trial Court overruled petitioner's demurrer to the due-on-sale cause of action. The Trial Court in so ruling said:

> "It is the opinion of this court that the Supreme Court of the State of California must have granted a hearing in *Tucker* in order to clarify and change this existing case law, including the dicta in *La Sala.* If the Supreme Court, in *Tucker,* should rule that due-on-sale clauses are valid under all circumstances, then defendant will have the availability of other motions to attack again the first cause of action of plaintiff's complaint."

The Trial Court at this time didn't know what the law was, and said so.

A court-made change in the substantive rules of law cannot constitutionally be made applicable to contracts made before the

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7. See footnote 1, *ante.* [1. When the Supreme Court denied the Petition for Rehearing on *Wellenkamp,* it had before it all the points raised here by Petitioners. Declaration of David W. Lennihan, attached hereto as Exhibit A.]

court-made change, to any degree greater than can legislative change of the same kind.

> " '[T]o permit a subsequent judicial decision in any one case on a point of law to open and annul everything that has been done in other cases of a like kind for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of mankind, no such pernicious precedent is to be found.' " *Bank of America v. Department of Mental Hygiene,* 246 Cal.App.2d 578, 586 (1966).
>
> "Although it is the general rule that a decision by a court of supreme jurisdiction overruling a prior decision is retrospective [sic] in operation, there is a well-recognized exception to this rule: Where a statute has received a given construction by the court and contracts have been made or property rights acquired in accordance with the court's decision such contracts will not be invalidated nor will vested rights acquired under the decision be impaired by a change in construction adopted in a subsequent decision. In such a situation, the later decision will be given prospective, and not retrospective [sic], effect."

Mitchell v. National Auto. & Casualty Ins. Co., 38 Cal.App.3d 599, 604 (1974).

The principle was applied in 1853 by the United States Supreme Court which, in *Ohio Life Insurance and Trust Co. v. Debolt,* 57 U.S. (16 How.) 415 (1853) said:

> "Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow *those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce.* . . . And the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law." 57 U.S. at 432 (emphasis added).

Bank of America v. Burg Bros., 31 Cal.App.2d 352 (1939); *Bennett v. Superior Court,* 5 Cal.App.2d 13 (1935); *Brown v. Ferdon,* 5 Cal.2d 226 (1936); *Craemer v. Norton Realty Co.,* 33 Cal.App.2d 340 (1939); *Drapeau v. Smith,* 34 Cal.App.2d 84 (1939); *Hales v. Snowden,* 19 Cal.App.2d 366 (1937); *Kirkpatrick v. Stelling,* 36 Cal.App.2d 658 (1940); *Shelly v. Kraemer,* 334 U.S. 1 (1947).

See also Westbrook v. Mihaly, 2 Cal.3d 765, 800 (1970) and *Forster Shipbuilding Co. v. County of Los Angeles,* 54 Cal.2d 450 (1960).

The Constitutional defect is not under the Contract Clause; it is under the Fourteenth Amendment's guarantee of due process.

> "Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid. *Contributors to Pennsylvania Hospital v. Philadelphia,* 245 U.S. 20 (1917); *see El Paso v. Simmons,* 379 U.S. 497, 533-534 (1965) (Black, J., dissenting)." *United States Trust Company v. New Jersey,* 431 U.S. 1, 19 n. 16 (1976) (emphasis added).

The Court should not indulge in "the fiction that the law now announced has always been the law . . ." *Chevron Oil Co. v. Huson,* 404 U.S. 97, 107 (1971) "[A] change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change in the law." Holmes, J., in *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 371 (1910).

Courts therefore apply to contracts the law as it existed when the contracts were made. *Gelpcke v. Dubuque,* 1 Wall. 175 (1863), *Green County v. Conness,* 109 U.S. 104 (1883); *Linkletter v. Walker,* 381 U.S. 618, 624, 625 (1964); *Chevron Oil*

Co. v. Huson, supra, 106, 107 (1971); *Alan v. County of Wayne,* 200 N.W. (Mich.) 628, 678 (1972).

Where a clause imposing a continuing duty, formerly found valid, is later found invalid, the clause is treated as valid up to the time when the law with respect to its validity was changed. *Bendix Corporation v. Balax, Inc.,* 471 F.2d, 149, 158 (1972).

While this Court in *Wellenkamp* does not say that due-on-sale clauses were invalid and unenforceable in 1967, the Constitution would restrain it from doing so.

* * *

CERTIFICATE OF SERVICE

DAVID W. LENNIHAN states that he is a member of the Bar of this Court; that on November 29, 1979, he deposited in the mail at San Francisco, California, four (4) sealed envelopes, with postage fully prepaid thereon, containing three (3) copies of the foregoing Petitioners' Reply to Respondents' Brief in Opposition, addressed as follows:

Supreme Court of California
State Building
350 McAllister Street
San Francisco, CA 94102

Contra Costa County Superior Court
Courthouse
Court and Main Streets
Martinez, CA 94553

Steven M. Kipperman, Esq.
Friedman, Shawn, Kipperman & Sloan
407 Sansome Street, Suite 400
San Francisco, CA 94111

Gary Garfinkle, Esq.
1136 Orchard Road
Lafayette, CA 94549

David W. Lennihan

DAVID W. LENNIHAN
Spear Street Tower
One Market Plaza
San Francisco, CA 94105